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Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

No. 93-324

# In the Supreme Court of the United States

OCTOBER TERM, 1993

DIGITRON PACKAGING, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether substantial evidence supported the Board's finding that the pro-union conduct of supervisors during a union election campaign did not have a tendency to coerce employees into voting for the union out of fear of retaliation by those supervisors.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is unreported, but the judgment is noted at 995 F.2d 1066 (Table). The decision and order of the National Labor Relations Board (Pet. App. 22a-30a) is reported at 306 N.L.R.B. No. 67. The underlying decision and direction of election (Pet. App. 31a-63a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 1, 1993. A petition for rehearing was denied on August 4, 1993. Pet. App. 64a. The petition for a writ of

certiorari was filed on August 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a company that repackages automobile parts for shipment, has approximately 60 production and maintenance employees. The production or packaging employees are supervised by 12 production analysts (PAs). Pet. App. 38a-39a.

PAs track and record the overall performance of the packers on the line they are supervising. PAs can require packers to redo unsatisfactory work, give oral warnings, and have "limited authority" to transfer packers to another line. Pet. App. 46a. PAs are responsible for evaluating the performance of the packers whom they supervise. Those evaluations are then reviewed by the senior officers of the petitioner. *Id.* at 42a, 48a. PAs have no authority to hire or fire employees. *Id.* at 49a.

In early November, 1990, Local No. 243, International Brotherhood of Teamsters (the Union) began an organizing campaign among petitioner's production and maintenance employees. Pet. App. 50a. At the initial organizational meeting, about 40 employees and seven PAs met with Union Organizer Tom Ziembovic at the Union's meeting hall. *Ibid.* PA Michael Robertson sat at a table at the front of the hall. At one point, Robertson told the group that "if [we] had one more than fifty percent sign authorization cards * * * the [Union] was automatically in as the bargaining representative." *Id.* at 51a-52a. Neither Robertson nor any other PA distributed authorization cards or solicited signatures at this meeting or at any subsequent time. *Id.* at 50a, 52a, 56a. On November 13, 1990, the Union filed a petition for a representation election with the Board's regional office. *Id.* at 33a.

As the campaign progressed, several additional incidents occurred in which PAs expressed support for the

Union to the production workers. In early December, PA Robert Sleeper told employee Phyllis Huff that he supported the Union during a casual conversation that occurred while Huff was working. Pet. App. 53a. In mid-December, a group of about seven employees and seven PAs met informally, with no union representative present, at a restaurant in a nearby shopping mall. Robertson said that he supported the Union because employees would get better benefits. In response to a question, Robertson said that petitioner would know who signed union authorization cards and employees might be fired if the Union lost. *Id.* at 50a-51a, 52a.

On about January 11, 1991, Robertson told four employees he supervised that petitioner needed a union and that there "would be trouble" if the employees did not select the Union as their bargaining representative. Pet. App. 53a. On January 18, the day of the Board representation election, Robertson, accompanied by PA Dorothea Garrett, asked employee Carlos Toro in a nonthreatening manner how he was going to vote in the election. *Id.* at 51a.

2. At the representation election, the 12 PAs voted, subject to challenge.[1] Because the initial tally (without including the challenged ballots) showed 32 votes for the

[1] A representation hearing had previously been held to determine unit coverage and other issues pertaining to the election. At that hearing, the Union and petitioner stipulated that the PAs were supervisors and were therefore excluded from the bargaining unit. Pet. App. 34a; Company Hearing Exh. 4. Because the parties' stipulation as to an employee's supervisory status is not binding on the Board, see Pet. App. 49a n.7, employees whose status is unsettled may vote in an election subject to challenge. See, *e.g.*, *A & B Cartage, Inc.*, 256 N.L.R.B. 14, 14 & n.2 (1981); *NLRB* v. *Montgomery Ward & Co.*, 242 F.2d 497, 501-502 (2d Cir. 1957); *Net Television, Inc.*, 252 N.L.R.B 640, 640-641 (1980). Subsequent to entering into the stipulation, the Union reconsidered its position and advised the PAs to vote in the election.

Union and 28 against it, the challenged ballots could have affected the result of the election. Pet. App. 34a. Petitioner and the Union subsequently agreed, however, that the challenges should be sustained, because the challenged ballots were cast by individuals in a classification specifically excluded from the stipulated bargaining unit. The Regional Director then issued a revised tally showing that the Union had won by a 32-28 vote. *Id.* at 34a-35a.

Petitioner filed objections to the election. In Objection 1, petitioner alleged that the Union improperly encouraged supervisors to solicit employees to sign authorization cards and urge them to support the Union. In Objections 2 and 3, petitioner alleged that the Board agent who conducted the election improperly permitted supervisors to be present in the polling area during the election, and improperly "permitted conversations among supervisors and eligible voters while both were waiting in line to vote." Pet. App. 34a-36a.

After an evidentiary hearing, the Board's hearing officer agreed with the parties' stipulation that the PAs were supervisors, but recommended that petitioner's objections to the election nonetheless be overruled. Pet. App. 37a-63a. The hearing officer noted that the question whether an election should be set aside because of pro-union conduct by supervisors depends on "whether employees would support the union out of fear of retaliation from those supervisors should employees not support the union." *Id.* at 56a. In making that determination, the Board examines "the extent of the supervisor's authority and the nature of the pro-union conduct." *Ibid.* The hearing officer concluded that the alleged objectionable conduct of Robertson and Sleeper was insufficient to warrant setting aside the election.

The hearing examiner explained that the PAs were "voicing their views as any other employee would" and

did not suggest that they would retaliate should the Union lose the election. Pet. App. 56a. The hearing officer concluded that Robertson's message was that the employees needed the Union because of possible retaliation by "higher management," not by him in his capacity as a PA. *Id.* at 57a. Moreover, the possibility of retaliation suggested by Robertson is "generally held to have a reasonable tendency to dissuade employees from supporting a union even when those threats are transmitted by a supervisor friendly to the union." *Ibid.* Those comments therefore could not be the basis for setting aside an election in favor of the Union.

The hearing officer also rejected petitioner's contention that the PAs should not have been allowed to be present in the polling place to cast challenged ballots. Under Board procedures, employees whose supervisory status is open to question are permitted to vote subject to challenge, and must be allowed in the polling area for that purpose. Pet. App. 60a-61a. The hearing officer, noting that petitioner allowed the PAs to vote, also observed that the Board will not set aside an election based on conduct within the employer's control. *Id.* at 61a.

3. The Board denied petitioner's exceptions to the hearing officer's report and certified the Union as the employees' bargaining representative in the stipulated unit. Pet. App. 31a-32a. Thereafter, petitioner refused to bargain with the Union. *Id.* at 25a. The Board, on summary judgment, found that petitioner's refusal to bargain and furnish relevant information violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and it entered an appropriate order. Pet. App. 25a, 26a-28a.

4. The court of appeals upheld the Board's decision and enforced its bargaining order. Pet. App. 1a.

The court concluded that substantial evidence supported the Board's finding that Robertson's and

Sleeper's expressions of support for the Union "did not have a tendency to coerce employees into voting for the Union out of fear of retaliation." Pet. App. 12a. Although several PAs attended meetings at the union hall, none distributed authorization cards or solicited employees to sign them. *Id.* at 11a-12a. Moreover, substantial evidence supported the Board's finding "that Robertson's and Sleeper's actions and comments were made under noncoercive and nonthreatening circumstances." *Id.* at 12a. In view of the "limited" nature of the PAs' supervisory role, the court concluded that "it was unlikely that Robertson's or Sleeper's audience would treat [their] statements as something other than [their] personal speculations or feelings." *Id.* at 13a. Finally, the court agreed that it was not improper for the PAs, whose supervisory status had not been determined by the Board, to be present in the polling area for the purpose of voting. *Id.* at 16a-17a. The court concluded that any conversations between the PAs and the employees at the voting center were not such as would have impeded a free and fair election. *Ibid.*[2]

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

Petitioner argues (Pet. 9-10) that the appropriate standard for evaluating whether pro-union supervisory conduct tainted an election is whether the conduct at issue would "reasonably tend[ ] to have a coercive effect" on the employees, as measured by "both the extent of the

[2] Senior Judge Wellford dissented, arguing that the Board erred in "failing to find that the supervisory irregularities and misconduct present here precluded a free and fair election." Pet. App. 21a.

supervisor's authority and the extent of his pro-union activity." *NLRB* v. *Island Film Processing, Inc.*, 784 F.2d 1446, 1451 (9th Cir. 1986).[3] Petitioner contends (Pet. 10-13) that the court of appeals failed to apply that standard and thereby created a conflict in the circuits warranting this Court's review. Contrary to petitioner's argument, there is no difference in approach between the court of appeals here and the Ninth Circuit. Applying the very standard petitioner espouses to the facts of this case, the court of appeals properly determined that the supervisory conduct did not warrant setting aside the election.

The court of appeals concluded that the record supported the Board's finding that the alleged objectionable "conduct did not have a *tendency* to coerce employees into voting for the Union out of fear of retaliation." Pet. App. 12a (emphasis added). Moreover, the court looked to the nature and extent of the supervisors' pro-union activity and also to the extent of their authority. In conducting that analysis, the court noted that only two of twelve PAs engaged in any organizing activity; that the PAs had limited authority over the employees they supervised;[4] that their conduct was essentially limited to ex-

[3] Petitioner does not dispute the Board's longstanding rule that pro-union supervisory conduct is not objectionable unless it has a potential for "coerc[ing] an employee into supporting the union out of fear of future retaliation by a union-oriented supervisor." *Sheraton Motor Inn*, 194 N.L.R.B. 733, 734 (1971). As petitioner notes (Pet. 10), the Board will also set aside an election where supervisors actively encourage employees to vote for the union if the employer takes no position to the contrary and employees might be led to believe the employer supports the union. *Sheraton Motor Inn*, 194 N.L.R.B. at 734.

[4] Petitioner errs in suggesting (Pet. 12-13 & n.4) that the court of appeals relied on a categorical distinction between major and minor supervisors in upholding the Board's order. On the contrary, the court assessed the PAs' actual responsibilities and did

pressing their personal views; and that the PAs did not distribute or solicit signatures on authorization cards or ask any employee to vote for the Union. *Id.* at 12a-16a. After considering those factors, the court properly concluded that substantial evidence supported the Board's conclusion that the supervisors' conduct would not have tended to coerce the employees into voting for the union.

As the court of appeals observed (Pet. App. 15a), the facts were markedly different in the Ninth Circuit cases on which petitioner relies.[5] In *Island Film Processing Co.*, the supervisors "signed authorization cards in the presence of other employees" and "engaged in almost continuous conversations at the work place." 784 F.2d at 1452-1453. Moreover, all the supervisors at issue "vocalized their * * * support [of the Union to] the employees who voted." *Id.* at 1453. On those facts, the Ninth Circuit concluded that the supervisors' activity had the tendency to coerce the employees' exercise of free choice and therefore set aside the election. That result was attributable, however, to the facts of that case, and not to any difference in approach between the Ninth Circuit and the court of appeals in this case.[6]

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not rely simply on their position in the management hierarchy. The Ninth Circuit follows the same approach. See *NLRB* v. *Cal-Western Transport*, 870 F.2d 1481, 1485 & n.2 (1989); *Island Film Processing Co.*, 784 F.2d at 1451-1452.

[5] Distinguishing the cases on their facts, the court of appeals noted that its decision was consistent with the Ninth Circuit's decision in *NLRB* v. *Island Film Processing Co.*, *supra*. See Pet. App. 15a.

[6] In two subsequent cases with facts more similar to those in this case, the Ninth Circuit concluded that supervisory involvement in organizing campaigns did not have the tendency to taint representation elections. In *Cal-Western Transport*, 870 F.2d at 1485, the court concluded that the conduct of a supervisor who expressed support for the union at four or five meetings and engaged in other pro-union activity did not warrant setting aside an elec-

The dispute in this case is therefore over whether the court of appeals properly concluded on the facts of this case that the supervisors' conduct did not have the tendency to coerce the employees' exercise of free choice in the representation election. That fact-bound issue does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, it is clear that the court of appeals was correct in concluding that substantial evidence supported the Board's finding that the nature and scope of the PAs' pro-union activity did not create any significant danger of coercion, especially in light of the PAs' limited supervisory authority. See Pet. App. 12a-16a.

tion, because his activity was not coercive and his supervisory authority was limited. In *Napili Shores Condominium* v. *NLRB*, 939 F.2d 717, 720 (9th Cir. 1991), the court held that a supervisor's alleged statement that the employees needed a union to obtain better wages was not objectionable, because such a statement would have reflected only his personal views and "there [was] no indication that [he] would have retaliated against [the employees] had they determined not to vote for the Union."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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